

Spring 1961

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Recommended Citation

(1961) "Automatic Amendment of Pleadings: Federal and Indiana Practice," *Indiana Law Journal*: Vol. 36 : Iss. 3 , Article 5.
Available at: <http://www.repository.law.indiana.edu/ilj/vol36/iss3/5>

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AUTOMATIC AMENDMENT OF PLEADINGS: FEDERAL AND INDIANA PRACTICE

The rationale of modern pleading in federal practice is to facilitate a proper decision on the merits. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel will be decisive to the outcome" They do not conceive of the function of the pleadings as being the preparation of a case for trial. They reject the "issue-pleading" of common law because it failed to expose the real issues and "fact pleading" because it left too many facts yet to be determined.² For these were substituted "notice-pleading."³ The narrowing of issues and the determining of fact are accomplished through other means such as: motions for a more definite statement,⁴ the pre-trial conference,⁵ and the provisions for depositions and discovery.⁶

The pleading itself under the Federal Rules is a short, concise statement of the sequence of events on which the cause of action is based.⁷ Likewise, the amendment mechanism of the federal rules is simple and streamlined.⁸ Rule 15(b) of the Federal Rules of Civil Procedure⁹ is a

1. Conley v. Gibson, 335 U.S. 41 (1957).

2. Pike and Willis, *The New Federal Deposition-Discovery Procedure: I*, 38 COLUM. L. REV. 1179 (1938).

3. Kuhn v. Civil Aeronautics Bd., 183 F.2d 839 (D.C. Cir. 1950).

4. FED. R. CIV. P. 12(e). The motion for more definite statement and for bill of particulars is provided to attack the defect of a vague complaint. See generally Pike, *Objections to Pleadings Under the New Federal Rules*, 47 YALE L.J. 50, 62 (1937); 1A BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 362 (1960) [hereinafter cited as BARRON AND HOLTZOFF].

5. FED. R. CIV. P. 16.

6. FED. R. CIV. P. 26-37.

7. FED. R. CIV. P. 8(e).

8. FED. R. CIV. P. 15(a) provides for amendments as a matter of course within a limited time or, if such time has passed, by leave of court or written consent of the adverse party. FED. R. CIV. P. 15(d) provides for supplemental pleadings which set forth events which have happened since the date of the pleading sought to be supplemented.

9. FED. R. CIV. P. 15(b). "*Amendments to Conform to the Evidence*. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action shall be subverted thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

two-part procedure dealing with amendments¹⁰ made after the presentation of evidence has started, at the close of the evidence of either party, after the verdict has been returned, after entry of judgment, on appeal, or after remand.¹¹ Rule 15(b) authorizes that (1) the pleadings shall conform to the proof of any issues which were tried by the express or implied consent of the parties,¹² and, (2) where evidence is objected to as not within the pleadings, the court may permit amendment and shall do so freely if justice so requires.¹³ Rule 15(b) is not permissive in its terms.¹⁴ The court cannot refuse to treat the pleadings as amended to conform to the evidence if in fact the requisite trial of the issue can be found.¹⁵

Treated herein is that part of the rule which considers the pleadings deemed amended to conform to the proof. Rule 22(b)¹⁶ of the prelimi-

10. As stated in Rule 15(b), failure so to amend does not affect the result of the trial of these issues. This process of automatic amendment, a topic that receives consideration elsewhere in this note, makes it necessary for the reader to conceive of the amendment as being made at the time that the subject of the amendment was raised. There are, as will be pointed out, several requirements concerning issues which are sought to be treated as tried by implied consent, and these requirements make it difficult if not impossible in some cases to determine at what point of time in the trial the issues not raised in the pleadings were sufficiently tried by implied consent to become a part of the pleadings.

11. See 3 MOORE, FEDERAL PRACTICE ¶ 15.13, at 846 (2d ed. 1948) [hereinafter cited as MOORE]; 1A BARRON AND HOLTZOFF § 449, at 778-780; see generally 3 MOORE ¶ 15.07-15.16; 1A BARRON AND HOLTZOFF §§ 441-449.

12. Although closely connected, *aider by verdict* is a much more limited concept. Founded on common law, it rested upon the notion that a verdict must be considered to rest on legal evidence. Hence it is presumed that every fact necessary to warrant the verdict was proved at the trial; see CLARK, CODE PLEADING 736-738 (2d ed. 1947). *Aider by verdict* operated where there was a defect or omission in the pleading which would have been a fatal defect upon a motion to dismiss, but if the defect or omission was such as necessarily required proof at trial to permit recovery, the defect or omission was cured by the verdict. See *Manufacturers' Mut. Fire Ins. Co. v. Swaney*, 53 Ind. App. 429, 101 N.E. 843 (1913); *Sohn v. Cambern*, 106 Ind. 302, 6 N.E. 813 (1885); *Reid v. Mitchell*, 95 Ind. 397 (1883).

13. The purpose of the rule is to eliminate the technical objection of variance and to avoid the tyranny of formalism; see 1A BARRON AND HOLTZOFF 777; *Rosden v. Leuthold*, 274 F.2d 747 (D.C. Cir. 1960).

14. "When issues not raised by the pleadings are tried by express or implied consent . . . , they *shall* be treated in all respects as if they had been raised in the pleadings. . . ." [Emphasis added.] See *Hasselbrink v. Speelman*, 246 F.2d 34 (6th Cir. 1957).

15. Cf. *Moiger v. Johnson*, 180 F.2d 777 (D.C. Cir. 1950); *Levin v. Coe*, 132 F.2d 589 (D.C. Cir. 1942).

16. PRELIMINARY DRAFT Rule 22(b). "*Amendments to Conform to the Evidence*. During a hearing or trial the pleadings shall be deemed amended to conform to all evidence that is received without objection. If there is objection to any evidence on the ground that it is inadmissible under the pleadings and the objecting party shows to the satisfaction of the court that the admission of such evidence would actually prejudice him in maintaining his action or defense upon the merits, the court shall (1) sustain the objection or (2) allow the pleadings to be amended and order a continuance upon such terms as are just; but if the objecting party fails to show to the satisfaction of the court that the admission of such evidence would prejudice him in maintaining his action

nary draft of the Federal Rules of Civil Procedure introduced the concept of amendment without physical change of the pleadings. Its forerunner, Equity Rule 19,¹⁷ was a general rule permitting amendment at any time, including the appellate stage, at the discretion of the court. Under the equity rule, a new defense could not be set up on appeal, but there could be an amendment in the appellate court to conform the pleadings to the proof. A plaintiff could not amend to state a theory other than the one on which the case was tried, but he could change the cause of action to conform to the evidence introduced by the defendant.¹⁸

The automatic amendment of Rule 15(b) operates in two instances when the adverse party does not object to the introduction of evidence.¹⁹ These are (1) when one party introduces evidence going to an issue not raised by the pleadings,²⁰ and (2) when both parties introduce evidence going to an issue not raised by the pleadings.²¹

The case of *Shelley v. Union Oil Co.*²² illustrates the operation of the rule when both parties introduce evidence going to an issue not in the pleadings. Plaintiff sued to recover damages for injuries suffered in a fall allegedly due to the negligence of the defendant in spilling oil on a stairway where the plaintiff worked. The defendant did not affirmatively plead the defense of contributory negligence,²³ but on direct examination of the plaintiff's witnesses, testimony was given from which the jury could infer that the plaintiff was guilty of contributory negligence.²⁴ This point was further developed by the defendant on cross-

or defense upon the merits, the court shall overrule the objection and the pleadings shall be deemed amended so that the evidence objected to becomes admissible under the pleadings."

17. Equity R. 19, 226 U.S. 654 (1912). "The court may at any time in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended supplemental pleading. The court at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

18. See 3 MOORE 808-812, and cases cited; HOPKINS, EQUITY RULES 90-92, 157 (5th ed. 1925).

19. 3 MOORE 848.

20. *E.g.*, U.S. v. Cushman, 136 F.2d 815 (9th Cir. 1943); Albers Milling Co. v. Farmer's Produce Co., 225 F.2d 915 (8th Cir. 1955); Hasselbrink v. Speelman, 246 F.2d 34 (6th Cir. 1957); Albert v. Joralemon, 271 F.2d 236 (9th Cir. 1959); Rosden v. Leuthold, 274 F.2d 747 (D.C. Cir. 1960); Southern Pacific Co. v. Libbey, 199 F.2d 341 (9th Cir. 1952); Pasquel v. Owen, 186 F.2d 263 (8th Cir. 1950).

21. *E.g.*, Hall v. National Supply Co., 270 F.2d 379 (5th Cir. 1959); Shelley v. Union Oil Co., 203 F.2d 808 (9th Cir. 1953).

22. 203 F.2d 808 (9th Cir. 1953).

23. Rule 15(b) operates as an exception to FED. R. CIV. P. 12(h) to the effect that defenses not pleaded are waived. See generally 3 MOORE 846. See, *e.g.*, Farm Bureau Cooperative Mill v. Blue Star Foods, 238 F.2d 326 (8th Cir. 1956).

24. The evidence received from these witnesses did not go to the issue of the defendant's negligence but to a new issue, *i.e.*, the defense of contributory negligence.

examination without objection. The court instructed the jury on the issue of contributory negligence. The plaintiff objected to the instruction on the ground that the issue had not been raised by the defendant's pleading and on appeal assigned the giving of this instruction as error. It was held on appeal that the issue was tried by the implied consent of the parties and should be treated as raised in the pleadings;²⁵ and further that the failure to amend did not affect the result of the issues tried without objection.²⁶

The case of *Hasselbrink v. Spellman*²⁷ serves as an example of the automatic amendment process where only one party introduces evidence going to issues beyond the pleadings. There was a negligence action arising from a collision of an automobile occupied by the plaintiffs and the one driven by the defendant. The plaintiffs did not plead the doctrine of "sudden emergency," but introduced evidence on this issue. The defendant did not object to the introduction of this evidence. The trial court refused to instruct on the issue, and on appeal the plaintiffs raised as error this refusal to instruct the jury as requested. The court of appeals held, in reversing the lower court, that the issue of "sudden emergency" had been tried by implied consent.

These two cases point up the primary problem involved: What constitutes implied consent under Rule 15(b) when evidence is introduced by one party or by both? A second consideration is whether a distinction is necessary when no instruction is requested, but automatic amendment is sought on appeal. A comparison of like procedures in Indiana will also be explored.

The Requirement of Implied Consent. When the parties expressly agree to try an issue not raised by the pleadings, it would seem clear that

See text accompanying note 32 *infra*, for a discussion of the exception that evidence introduced to support the pleadings which raises an incidental issue will not operate as an automatic amendment.

25. "The only apparent limitation on the parties is that the court have jurisdiction over the matter tried, although as a matter of practice issues tried by express or implied consent ordinarily do arise from the same general set of facts set forth in the complaint," 3 MOORE 845. At least one judge finds the automatic amendment mechanism of Rule 15(b) unfair: "An attempt to try issues which have not been outlined by either pleadings or pretrial order is not only futile, but is unjust. Any issue not so formulated cannot be tried because the parties do not know against what to defend." *U.S. v. Ahtanum Irr. Dist.* 124 F. Supp. 818, 827 (E.D. Wash. 1954).

26. Under the preliminary draft (22b), if there had been an objection to the introduction of this evidence, the pleadings would have been automatically amended to include this new issue if the objecting party had not shown he would have been prejudiced by its introduction. Under the present rule, there must be leave to amend the pleadings even when the objection has been overruled, *i.e.*, there is no implied consent when the party has objected. Automatic amendment is limited to cases where no objection is made. *Pike*, *supra* note 4, at 67.

27. 246 F.2d 34 (6th Cir. 1957).

no reason for requiring a physical change in the pleadings can be shown. When, however, the consent is implied, it may be that one or both of the parties can legitimately complain of the automatic amendment procedure. Two instances when the consent of the parties will *not* be implied occur when the evidence raising the new issue is objected to, and when the evidence which is introduced goes to an issue raised by the pleadings, but which incidentally raises a new issue.

The possibility of automatic amendment naturally has an influence upon objections. If a party does not desire the issues to be expanded beyond the pleadings, timely objection is necessary. Evidence admitted over an objection without a motion for amendment will not raise an issue which can be tried by implied consent.²⁸ This puts a great deal of pressure on the opposing counsel. He must be aware of the significance of all matter introduced into evidence.²⁹ A pitfall involved in the necessity for timely objection may arise when a party, before the start of the trial, requests an amendment to raise a new issue and the request is denied. It has been held that if he subsequently introduces evidence going to that issue, the opposing counsel must object because the introduction of this evidence without a further objection will result in the trial by implied consent of the issue—regardless of the prior denial of amendment.³⁰ While this case technically meets the criteria of an absence of an objection, it may appear unfair. The fact that the request for an amendment has been made however, should put the opposing attorney on guard for an attempt to admit such evidence.

In attempting to reach a just decision on the merits, it would seem that an objection to the evidence offered which is based merely on the ground that it presents an issue outside the pleadings should not be sustained. If the adverse party cannot show prejudice the pleadings should be amended without physical change or motion of the introducing party, similar to the outcome under Rule 22(b) of the preliminary draft.³¹

28. See *Rosenberg v. Hano*, 39 F. Supp. 714 (E.D. Pa. 1940); *Hay v. Nance*, 119 F. Supp. 763 (D. Alaska 1954). If the introduction of evidence is objected to and the objection is sustained with leave to amend, no amendment actually being made, it seems that the objecting party could not on appeal assign the failure to amend as error. See *Pike*, *supra* note 4, at 67. Testimony admitted over objection unaccompanied by a motion to amend however, does not result in issues being tried by implied consent; cf. *Rosenberg v. Hano*, *supra*.

29. The necessity for increased awareness was early recognized in *Wells*, *Implied Consent Under the New Federal Rules*, 13 FLA. L.J. 18 (1939).

30. Cf. *U.S. v. Cushman*, 136 F.2d 815 (9th Cir. 1943).

31. Note 16 *supra*. In *Newman v. Zinn*, 164 F.2d 558 (3d Cir. 1947), the court indicates that the defendant must insist that the plaintiff amend his complaint if his objection is simply that the evidence objected to is outside the pleadings. Although the result seems desirable, it appears to be erroneous in light of the cases cited at note 28 *supra*.

Even though no consent could be implied, it would be clear that the adverse party would have notice that a new issue was being injected, and as will be brought out later, this is all that is necessary.

The pleadings are not deemed amended to conform to evidence which is introduced by a party to support an issue already in the pleadings but which incidentally touches another theory or issue not raised in the pleadings.³² Such evidence is not such as to permit an automatic amendment because of a basic qualification of Rule 15(b), *i.e.*, the issues so raised must be tried by express or implied consent of the parties.

It is not enough simply to have introduced evidence on the issue. There must be some determination that the adverse party knows or should know what issues are being tried. The implication of the words of the rule is that notice of what is being tried is essential,³³ for without notice, consent could not be implied; and, as the Rules seek a just decision, surprise should not be a factor in the outcome of the case. The likelihood that evidence introduced over objection or evidence which supports an issue raised in the pleadings would not give the adverse party notice of what issues were being litigated precludes these two situations from giving rise to implied consent.³⁴

Even though notice is given, the possibility remains that the adverse party does not have *knowledge* that a new issue has been raised. There is the chance that there is a lack of actual knowledge but that trial of an issue by implied consent has occurred whether one or both parties introduce evidence on the issue outside the pleadings. The rule apparently does not contemplate a requirement of actual knowledge; instead, *notice* is necessary. "It is now generally accepted that there may be no subsequent challenge of issues which are actually litigated, if there has been actual notice and adequate opportunity to cure surprise. . . . Actuality of notice there must be, but the actuality, not the technicality must govern."³⁵ The court must use some sort of objective test in deciding

32. *Gallon v. Lloyd-Thomas Co.*, 264 F.2d 821 (8th Cir. 1959); *Otness v. U.S.*, 23 F.R.D. 279 (D. Alaska 1959); *but cf.* *Wall v. Brim*, 138 F.2d 478 (5th Cir. 1943).

33. See 1A BARRON AND HOLTZOFF 792. It is obvious that terms such as *fair notice*, *notice* and *implied consent* are difficult to define. Their meaning is determinable, if at all, only upon examination of the facts of the individual case. See notes 35, 36 *infra*.

34. See generally 3 MOORE ¶ 15.13. If the objection is based solely on the fact that the evidence sought to be introduced is outside the pleadings, of course, the necessary notice would be present and automatic amendment would seem proper despite the objection. See text accompanying note 31 *supra*.

35. *Kuhn v. Civil Aeronautics Bd.*, 183 F.2d 839, 842-843 (D.C. Cir. 1950). Notice, as opposed to knowledge, apparently requires only that certain factors be present which *could* have given knowledge. Knowledge, however, requires at least an objective finding that certain information was acquired. An objective finding is also required for notice, but the determination must be only that the factors necessary to give notice were present, not that the information was acquired. *E.g.*, failure to object or the introduction

what constitutes notice.³⁶ Some cases present themselves with more certainty than others in determining what issues not in the pleadings were actually litigated with the implied consent of the parties, *e.g.*, when both parties introduce evidence, one party will not be heard to say that the issue was not tried.³⁷ If both parties introduced evidence on the new issue, neither could be prejudiced even though neither realized a new issue was being tried.³⁸ The offering of evidence by each of the parties must be taken as a manifestation that a reasonable man would have known that an issue outside the pleadings was being introduced. If one of the parties is actually aware that a new issue is being tried he undoubtedly would have a slight advantage. Again, however, the introduction of evidence should be taken as implied consent. An objective standard of notice is the most that can be hoped for, and the possibility of surprise when a party has introduced evidence on a new issue is small.

Where only one party introduces evidence to which the adverse party fails to object, the possibility of surprise is somewhat greater. As noted earlier,³⁹ the possibility of automatic amendment when evidence is introduced by only one party puts a great deal of pressure on the opposing counsel. This is the one instance where the rule may give a sharp practitioner an undue advantage, or unduly prejudice the adverse party.

The only sure protection against possible surprise would be to require a party who attempts to introduce evidence on issues outside the pleadings to verbalize the fact that a new issue is being presented at the time of the introduction of the evidence. This could be done in the form of an amendment. The trend towards more liberalized amendment and speedier trials with a minimum of formalism however, makes this procedure regressive. A better solution might be to require an amendment when the request for an instruction is made, or, if there is no jury, at

of evidence provides the basis for the finding of consent, not because there is knowledge but because these factors can be said to be such that a reasonable man would have known a new issue had been introduced.

36. Several tests have been suggested: "The test of 'implied consent' should be whether the objecting party had a fair opportunity to meet the new issue; if he did, it can be held to have been tried by implied consent, and whether or not it constitutes a new claim or defense is immaterial. . . ." *Trial of Issues by Implied Consent*, 3 FED. RULES SERV. 692 (1940). "The test should be whether the defendant would be prejudiced by the implied amendment, *i.e.*, whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory," 3 MOORE 847. "A party impliedly consents to the introduction of issues not raised in the pleadings by failure to object to the admission of evidence relating thereto. . . ." 1A BARRON AND HOLTZOFF 782.

37. *Hall v. National Supply Co.*, 270 F.2d 379 (5th Cir. 1959).

38. The evidence must at least be as new as to not come within the rule that issues raised that are incidental to issues within the pleadings will not cause an automatic amendment of the pleadings. See note 32 *supra* and accompanying text.

39. See text accompanying note 28 *supra*.

the close of the evidence. If the adverse party could show at this time that he was surprised and prejudiced in the presentation of his claim or defense, a continuance should be granted.

Automatic Amendment on Appeal. A more difficult problem arises when no instruction is requested and the party attempts to raise the new issue or theory for the first time on appeal. While a change of theory or the introduction of new issues without formal amendment is allowed during the course of the trial,⁴⁰ such a change is not generally allowed on appeal even though the necessary notice would appear to be present in such cases.⁴¹ Two reasons have been offered for not allowing an amendment on appeal. First, it is argued that it would be patently unfair⁴² to allow a party to jump from theory to theory on appeal because it precludes the adverse party from having an opportunity to present evidence of his own, or to raise a new defense, and might lengthen unnecessarily the course of the litigation. As stated by one court:

Plaintiffs would shift their ground and try a new theory of recovery. The effect of the amendment they propose would not be to conform the pleading to a judgment they have won, but to jeopardize and perhaps to overthrow a judgment they have lost. It is a prime purpose of 15(b) to avoid the necessity of new trials because of procedural irregularities, not to set judgments aside and make new trials necessary. If this latter application of the Rule were permitted, a losing party, by motions to amend and rehear, could keep a case in court indefinitely, trying one theory of recovery or defense after another, in hope of finally hitting upon a successful one.⁴³

40. *Nester v. Western Union Telegraph Co.*, 25 F. Supp. 478 (C.D. Cal. 1938); *Hampton Roads Carriers, Inc. v. Boston Ins. Co.*, 150 F. Supp. 338 (D. Md. 1957). *Contra*, *Sears, Roebuck & Co. v. Marhenke*, 121 F.2d 598 (9th Cir. 1941).

41. *Hart v. Knox County*, 79 F. Supp. 654 (E.D. Tenn. 1948); *accord*, *Cleary v. Indiana Beach, Inc.*, 275 F.2d 543 (7th Cir. 1960). When the issues are tried by the court, of course, no instruction can be requested. Presumably, however, it would be no different if a request for a finding of fact was not made. Assuming that the trial judge is more aware of the issues tried than a jury would be, his determination of the instructions to be given, whether requested or not, would seem comparable to his determination of the findings of fact. In either case, it is the failure to bring matters to the attention of the trial court which generally prevents automatic amendment. It would seem that the treatment of such a case on appeal would be the same in that automatic amendment will not ordinarily be granted unless the party introducing the evidence has in some way shown he is aware that he has raised a new issue.

42. The concept of automatic amendment was viewed with disfavor in *U.S. v. Ahtanum Irr. Dist.*, 124 F. Supp. 818 (E.D. Wash. 1954).

43. *Hart v. Knox County*, 79 F. Supp. 654, 658 (E.D. Tenn. 1948). This argument seems to neglect the fact that any issue or theory sought to be raised for the first time on appeal would have to be supported by some evidence in the trial of the case. It does not appear likely that the threat of rampant appeals on new theories or issues is real

The second argument is that if it was unknown to the advancing party at the time evidence on the issue was introduced, there could have been no consent because consent requires knowledge on the part of the party introducing the evidence: "To have any kind of consent, there must be knowledge. It is apparent that the claim . . . occurred to counsel . . . after he had rested his case. Under the circumstances, neither the plaintiffs nor the counter-claimants tried the issue by implied consent."⁴⁴

It is arguable that not to allow an issue to be raised for the first time on appeal is unfair. It is conceivable that no further evidence could have been introduced by either party. This requirement has been modified so that when an issue is raised on appeal for the first time which will not upset the judgment but only modify it, the new issue is allowed.⁴⁵ Further, when a case is reversed on appeal because the record does not support the verdict, the presence in the record of evidence which raises an issue not in the pleadings, or not presented to the jury has been held under Rule 15(b) to operate to require a new trial instead of a reversal with directions to enter judgment notwithstanding the verdict.⁴⁶

It may be reasonable on appeal to deny a party the opportunity to raise an issue upon which he asked no instruction, when only one party has introduced evidence going to the issue. The speculative nature of a determination as to whether the adverse party could have met and overcome the issue with evidence of his own mitigates against finding a trial by implied consent. Moreover, a failure to request an instruction might here be treated as a waiver, just as the failure to object waives the issue of improper evidence on appeal.⁴⁷ The fact that litigation may be prolonged does not seem a particularly weighty consideration if a just decision on the merits is the desired result.⁴⁸ The earlier discussion concerning the meaning of implied consent shows that the argument that consent requires knowledge is unsound.⁴⁹

The contention that whether the issue was tried by implied consent is determined strictly by whether an instruction pertaining to the issue was requested, or whether objections were made to the instructions as

because it is still necessary to find notice in the trial court of the issues outside the pleadings. See text accompanying note 33 *supra*.

44. *City Messenger of Hollywood v. City Bonded Messenger Service*, 254 F.2d 531, 537 (7th Cir. 1958).

45. *Cf. Purofied Down Products Corp. v. Traveler's Fire Ins. Co.*, 278 F.2d 439 (2d Cir. 1960).

46. *Wall v. Brim*, 138 F.2d 478 (5th Cir. 1943).

47. See generally 1 WIGMORE, EVIDENCE § 18 (3d ed. 1940).

48. The likelihood of prolonged litigation is of doubtful probability in any case. See note 43 *supra*.

49. The rule operates if there is notice, whether *knowledge* is present or not. See text accompanying note 35 *supra*.

given⁵⁰ however, is too conceptualistic. The factor of most importance should be whether the adverse party can show that he was prejudiced by not learning until the appellate court was reached that a new issue or theory had been raised. The case for a change of theory on appeal is particularly strong when the parties tried the case on an agreed statement of facts, or where the case was tried by the court.

Automatic Amendment in Indiana. The purpose of the pleadings⁵¹ in Indiana has been said to be to inform the adverse party as to what he may meet in court,⁵² and one of the fundamental reasons for requiring a complaint to be in writing⁵³ is to inform the defendant of the nature of the plaintiff's cause of action with sufficient definiteness to enable him to prepare his defense.⁵⁴ There seems no obvious reason for not de-emphasizing the pleadings as has been done in the federal practice. The pleadings should serve as a means to an end, not as an end in themselves.⁵⁵

Several states have adopted statutes which follow or substantially follow Rule 15(b).⁵⁶ Indiana, in its code of civil procedure, has several provisions similar to those in the federal practice,⁵⁷ but has no single amendment statute similar to Rule 15(b). The Code of Procedure,⁵⁸ originally adopted in 1852 and re-enacted in 1881 without substantial change as a part of a proposed general revision of the statutory law of

50. See *Hasselbrink v. Speelman*, 246 F.2d 34 (6th Cir. 1957); *Atlantic Coast Line R.R. v. Darden*, 216 F.2d 125 (5th Cir. 1954); *Shelley v. Union Oil Co.*, 203 F.2d 808 (9th Cir. 1953); but see *Purofied Down Products v. Traveler's Fire Ins. Co.*, 278 F.2d 439 (2d Cir. 1960).

51. The term 'pleading' embraces all proceedings from the complaint until the issues are joined, and, in a still broader sense, covers all proceedings during the progress of the trial from its inception to its termination. 71 C.J.S. *Pleading* § 4a, 21 (1951); *Gaddie v. Holloway*, 237 Ind. 382, 146 N.E.2d 247 (1957).

52. *Chastain v. State*, 233 Ind. 64, 116 N.E.2d 107 (1954).

53. IND. ANN. STAT. § 2-1004 (Burns 1946) provides that the complaint shall contain a "statement of the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." Rule 1-2, Rules of the Supreme Court, 1958, does not modify the requirement of this section. See 1 GAVIT, INDIANA PLEADING AND PRACTICE 71 (2d ed. 1950) [hereinafter cited as GAVIT].

54. *Chicago, T.H. & S.E. Ry. v. Collins*, 82 Ind. App. 41, 142 N.E. 634, 143 N.E. 712 (1924).

55. CLARK, CODE PLEADING 54 (2d ed. 1947) [hereinafter cited as CLARK].

56. CLARK 712 n.36 lists the following statutes as taken from Rule 15(b): ARIZ. REV. STAT. ANN., Civ. Proc. 15(b) (1956); COLO. REV. STAT. ANN., Civ. Proc. 15(b) (1953); IOWA CODE, Civ. Proc., Rule 249 (1951); MO. REV. STAT. § 509.500 (1949); N.M. STAT. ANN. § 21-1-1 (15b) (1953); S.D. CODE § 33.0914 (1939); TEX. R. CIV. P. 67 (1957).

57. For instance, Rule 1-4, Rules of the Supreme Court, 1958. See generally 1 GAVIT 98-100.

58. IND. ANN. STAT. §§ 1-101 through 2-4903 (Burns 1946). The Code was adopted in compliance with the mandate of IND. CONST. art. 7, § 20 (1851).

the state which never developed, was a layman's reform.⁵⁹ This state, long after other states have repudiated the doctrine, has applied the theory of the pleadings doctrine.⁶⁰ This doctrine requires that the pleader must have and maintain in his pleadings a definite theory of his case, and a judgment can be given in his favor on that theory and no other.⁶¹ While Indiana has been noted as a theory of pleading state,⁶² it is questionable that such is the case today.⁶³ Involved in the question of the present force of the theory of pleadings doctrine in the state is the question of to what extent Indiana permits automatic amendment⁶⁴ of the pleadings.

There are several relevant statutes that must be considered in answering these questions: (1) a variance between the pleadings and proof is only deemed material when the adverse party has been misled to his prejudice;⁶⁵ (2) where there has been a variance but the adverse party has not been misled, the court may order an amendment;⁶⁶ (3) a failure of proof results, as distinguished from a mere variance, when the allegations of a claim or defense to which the proof is directed are unproved, not only in some particular or particulars, but in its general scope and meaning;⁶⁷ and, (4) defects in the pleadings which might have been

59. Gavitt, *The New Federal Rules and Procedural Reform in Indiana*, 15 IND. L.J. 19 (1939).

60. Louisville, N.A. & C. Ry. v. Renicker, 8 Ind. App. 404, 35 N.E. 1047 (1893); Union City v. Murphy, 176 Ind. 597, 96 N.E. 584 (1911); Indianapolis Real Estate Bd. v. Willson, 98 Ind. App. 72, 187 N.E. 400 (1933); Neu v. Woods, 103 Ind. App. 342, 7 N.E.2d 531 (1937); Burkhardt v. Simms, 115 Ind. App. 576, 60 N.E.2d 141 (1945); Smith v. Thomas, 126 Ind. App. 59, 130 N.E.2d 85 (1955) (dissenting opinion).

61. See Johnston v. Griest, 85 Ind. 503 (1882); Mescall v. Tully, 91 Ind. 96 (1883). See generally CLARK 171.

62. See CLARK 259-263.

63. The following indicate that as early as 1930 it was felt that Indiana was losing this reputation: 6 IND. L.J. 402, 575 (1930); Gavitt, *Procedural Reform in Indiana*, 7 IND. L.J. 531 (1932); 11 IND. L.J. 351, 356, 357, 361 (1936); Gavitt, *supra* note 59, at 20.

64. Under early code practice it was generally held that a change in legal theory or in the facts was not possible even by amendment with leave of court during the trial. See Kerstetter v. Raymond, 10 Ind. 199 (1858); Miles v. Vanhorn, 17 Ind. 245 (1861); Thompson v. Jones, 18 Ind. 476 (1862); Holcraft v. King, 25 Ind. 352 (1865). Later cases recognized the right of a court to allow such an amendment. See Boyd v. Caldwell, 95 Ind. 392 (1884); Chicago, I. & L. Ry. v. Ader, 184 Ind. 235, 110 N.E. 67 (1916).

65. IND. ANN. STAT. § 2-1063 (Burns 1946): "No variance between the allegations in a pleading and the proof is to be deemed material, unless it have [sic] actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must be shown in what respect he has been misled; and, thereupon, the court may order the pleadings amended on such terms as may be just."

66. IND. ANN. STAT. § 2-1064 (Burns 1946): "Where the variance is not material, as provided in the last section, the court may order an immediate amendment, without costs."

67. IND. ANN. STAT. § 2-1065 (Burns 1946): "When, however, the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof."

amended at the trial will not upset a judgment.⁶⁸ There seems to be no doubt that the court on appeal will deem the pleadings amended to conform to the proof when the variance between the pleadings and proof is immaterial, such as when the complaint alleges that the defendant was negligent in failing to guard the left end of a dangerous machine, and the proof showed that another area of the machine was not protected.⁶⁹ It has been stated however, that the statute dealing with immaterial variance does no more than state the obvious position that an immaterial variance is immaterial;⁷⁰ and that the statute on material variances is simply an additional statute dealing with amendments during trial, identical with the statute⁷¹ concerned with amendments in general.⁷² This is a tenable position because a variance is only material when the facts proved are different from those pleaded,⁷³ and such variance is shown, by an objection first made in the trial court,⁷⁴ to have prejudiced the adverse party.⁷⁵ Within the terms of the statutes nothing precludes the judgment from being founded on issues or theories not contained in the pleadings, so long as the case has been fairly tried and determined without prejudice to the adverse party.⁷⁶

The provision concerning failure of proof⁷⁷ has been given two interpretations. One view holds that the statute provides that there can be no recovery no matter how perfectly some other cause of action was proved,⁷⁸ *i.e.*, "Appellee is bound by the theory of his complaint, and he must recover upon and according to that theory or not at all. A recovery . . . cannot be sustained unless the facts are found in accordance

68. IND. ANN. STAT. § 2-3231 (Burns 1946): "No judgment shall be stayed or reversed, in whole or in part, by the Supreme Court, for any defect in form, variance or imperfection contained in the record, pleadings, process, entries, or other proceedings therein, which, by law, might be amended by the court below, but such defect shall be deemed to be amended in the Supreme Court; nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below."

69. *M.S. Huey Co. v. Johnston*, 164 Ind. 489, 73 N.E. 996 (1905). See also *B. & O. Southwestern Ry. v. Slaughter*, 167 Ind. 330, 79 N.E. 186 (1906); *Oil-Well Supply Co. v. Priddy*, 41 Ind. App. 200, 83 N.E. 623 (1908).

70. 1 GAVIT 727.

71. IND. ANN. STAT. § 2-1066 (Burns 1946).

72. 1 GAVIT 729.

73. *Louisville & N. Ry. v. Hollerbach*, 105 Ind. 137, 5 N.E. 28 (1885).

74. *M.S. Huey Co. v. Johnson*, 164 Ind. 489, 73 N.E. 996 (1905); *Bradley v. State*, 165 Ind. 397, 75 N.E. 873 (1906).

75. See *M.S. Huey Co. v. Johnston*, 164 Ind. 489, 73 N.E. 996 (1905); *Chicago, T.H. & S. Ry. C. v. Collins*, 82 Ind. App. 41, 142 N.E. 634, 143 N.E. 712 (1924).

76. IND. ANN. STAT. § 2-3231, *supra* note 68.

77. IND. ANN. STAT. § 2-1065, *supra* note 67.

78. 23 I.L.E., *Pleading*, § 216, at 432 (1959); FLANAGAN, WILTROUT & HAMILTON, *INDIANA TRIAL AND APPELATE PROCEDURE*, ch. 39, § 2061 (1952).

with the allegations of the complaint."⁷⁹ This position regards the pleadings as the standard for determining whether there has been a failure of proof, and supports the idea that Indiana is a theory of pleading state.

The other view is that the statute dealing with failure of proof does not more than state an obvious result to the effect that a material allegation which is not proved results in a defect of proof which the statutes on procedure do not and properly could not cure.⁸⁰ This interpretation does not limit the theory to that raised by the pleadings. It merely says that upon whatever theory the judgment may rest, all the essential elements of the cause of action must be present, thus indicating that the theory of pleadings doctrine is not really followed in Indiana.

A recent case also indicates that the Indiana courts permit automatic amendments. In *Smith v. Thomas*,⁸¹ the plaintiff sued for damages for injuries resulting from a collision involving his car and another. The certificate of title of the other car was in the defendant, but the car was being driven by the defendant's vendee. The complaint alleged an agency relationship between the defendant and the purchaser of the car. This relationship was based on the theory that the defendant, by allowing the purchaser to retain his license plates and failing to transfer the certificate of title, made the purchaser of the automobile the agent of the defendant in the final arrangements for the transfer.⁸²

At the conclusion of the plaintiff's evidence, the defendant asked for a finding in his favor. The court indicated that there was no evidence to sustain the allegation of agency, but that there was evidence which might show negligence on the part of the defendant. At the conclusion of the trial, there was a finding against the plaintiff on the issue of agency, but the trial court found that the defendant had turned over a dangerous instrumentality to an unqualified, unlicensed, incompetent minor, and was responsible for the consequences of the negligent act. On appeal, defendant argued that since the theory of the complaint was agency and the trial court found for him on that issue, no judgment could be had on the theory of negligence.

79. *Burkhart v. Simms*, 115 Ind. App. 576, 581, 60 N.E.2d 141 (1945).

80. 1 GAVIT 727.

81. 126 Ind. App. 59, 130 N.E.2d 85 (1955).

82. The complaint did allege negligence on the part of the purchaser in the operation of the automobile. Judgment was for the plaintiff and the purchaser did not join in the appeal. The court found on appeal that the defendant vendor had violated IND. ANN. STAT. § 47-2904 (Burns 1952) which provides: "It shall be unlawful for any person having any vehicle in his custody to cause or knowingly permit any under the age of eighteen [18] years to drive such motor vehicle upon the public highways unless such minor shall have first obtained a license or permit as provided in this act." This statute, however, appears to have been brought up for the first time on appeal.

To this contention, the court pointed to evidence which the defendant had himself introduced concerning the age of the purchaser of the automobile. The court also noted:

There appears no matter, motion or legal move of any kind or nature by either party in the complete record indicating that they had any objection, misunderstanding or question as to the issues and proof or the theory upon which the action was being tried. There appears no mention of any theory of the complaint, variance or failure of proof, from the beginning of the proceedings until . . . [the appeal].⁸³

The court concluded that from an examination of all the pleadings in the case, taken with the evidence introduced under these pleadings, that the evidence concerning negligence was "within the issues tendered",⁸⁴ and that on appeal the parties would be held to the theory on which the case was tried. Further, the court said that when, under the facts as pleaded and the evidence as shown from the record, it appears undoubtedly that a party is entitled to recovery, the pleadings are "deemed amended to conform to the evidence introduced."⁸⁵

Judge Crumpacker, dissenting, renews the theory of pleading doctrine by maintaining that there was a failure of proof. He contended that "[i]f we treat the present complaint amended to fit the theory adopted by the court as the basis of its decision, we completely abandon the cause of action pleaded and sanction recovery on a theory wholly outside the issues and concerning which essential facts were not originally alleged."⁸⁶

It is not clear from the majority opinion whether the evidence of negligence was admissible under the pleadings as they stood at the time of trial, or that such evidence was admissible because the parties abandoned the pleadings and tried the case on a theory different from that raised by the pleadings. It appears however, that the latter proposition is correct,⁸⁷ especially in light of the fact that at the beginning of the opinion the court states that the complaint was based on the existence of an

83. *Smith v. Thomas*, 126 Ind. App. 59, 65, 130 N.E.2d 85, 88 (1955). The evidence introduced appears to go to the issue of agency and thereby should not be such as to support an automatic amendment. See discussion on evidence raising incidental issues in text accompanying note 32 *supra*.

84. *Id.* at 65; 130 N.E.2d at 85. It is not clear whether this phrase means the "issues tendered" by the pleadings or by the evidence, but a reading of the whole case favors the latter interpretation. See discussion accompanying note 87 *infra*.

85. *Id.* at 68, 130 N.E.2d at 89.

86. *Id.* at 69, 130 N.E.2d at 89.

87. See especially the quotation in the text accompanying note 83 *supra*.

agency relationship.⁸⁸ In addition, the majority cites the case of *Morgan v. Sparling*,⁸⁹ in which it was determined through a reading of the evidence that "the parties voluntarily abandoned the issues made by the pleadings and chose their own issue and theory and conducted the trial thereon."⁹⁰ It seems then that when both parties introduce evidence which goes to an issue or theory outside the pleadings, the pleadings will be deemed amended to conform to the evidence introduced by the parties in support of the adopted theory, and that the court will consider this adopted theory as the basis for judgment.⁹¹

This seems proper. There would be little utility in denying the litigants the option of setting the boundaries of their controversy. The objection that one of the parties will be prejudiced by the change of issue or theory is eliminated. The same considerations should prevail that are applicable in federal courts, *i.e.*, a change in the nature of the cause of action or legal theory is immaterial so long as the opposing party has not been prejudiced in presenting his case.⁹² Finding a change of legal theory is most likely when both parties have introduced evidence supporting this new theory, for the evidence as well as the pleadings are examined to determine the theory upon which the case was actually tried.⁹³ If the theory is not presented at the trial court level however, it cannot be presented for the first time on appeal.⁹⁴ Further, it cannot be said that the Indiana statutes which have given rise to automatic amendment and physical amendment after trial to conform the pleadings to the proof have as yet produced practices as liberal as those prevalent in the federal

88. "The complaint . . . was based upon the alleged negligence of . . . [the defendant purchaser], and agency between . . . [purchaser] and the . . . [defendant]." *Smith v. Thomas*, *supra* note 83 at 62, 130 N.E.2d at 87.

89. 124 Ind. App. 310, 115 N.E.2d 514 (1953). This case contains essentially the same language at 313, 115 N.E.2d at 515, which is quoted from the *Smith* case in the text accompanying note 83 *supra*.

90. *Id.* at 313, 115 N.E.2d at 515.

91. See *Southern Indiana Ry. v. Drennen*, 44 Ind. App. 14 (1909); *Morgan v. Sparling*, 124 Ind. App. 310, 115 N.E.2d 514 (1953). Another situation which is similar, but distinguishable from automatic amendment, is the situation where more than one theory is included in the complaint, only one of which is proved at the trial. See, *e.g.*, *Walker v. Ellis*, 126 Ind. App. 353, 129 N.E.2d 65 (1955). In such a case no automatic amendment is necessary, since the pleadings raise the issue tried as well as other issues.

92. *Nester v. Western Union Telegraph Co.*, 25 F. Supp. 478 (S.D. Cal. 1938); *Scott v. Baltimore & O. Ry.*, 151 F.2d 61 (3d Cir. 1945); *Matarese v. Moore-McCormack Lines, Inc.*, 158 F.2d 631 (2d Cir. 1946).

93. *Morgan v. Sparling*, 124 Ind. App. 310, 115 N.E.2d 514 (1953); *cf.* *Weaver v. Brown*, 51 Ind. App. 379, 99 N.E. 825 (1912); *Montgomery v. Montgomery*, 81 Ind. App. 1, 140 N.E. 917 (1923).

94. *Oolitic Stone Co. v. Ridge*, 169 Ind. 639, 83 N.E. 246 (1907); *Gumberts v. Greenberg*, 124 Ind. App. 138, 115 N.E.2d 504 (1953). Although it appears that the *Smith* case was tried by the court, the question of a trial of a new issue was obviously not raised for the first time on appeal, since the trial court made a finding on this issue. See note 41 *supra*.

practice. Indiana does not permit defenses which have been waived by failure of a party to specially plead them⁹⁵ to be tried by implied consent. Nor are the pleadings deemed amended to conform to evidence introduced by only one party.

In both Indiana and the federal courts, the pleadings have become increasingly less of a trap for either counsel.⁹⁶ If the cases in which both parties introduce evidence on a new issue are eliminated from consideration however, automatic amendment may become a process which works an injustice. But the instances in which a new issue could be litigated when the other party is unaware of its existence are seemingly few. If the parties on both sides have properly prepared their case to meet any likely theories which can be established from the complaint no surprise is likely to result. In addition, there are available the various methods of discovery of facts in both federal and state practice.⁹⁷ To ensure that the parties are aware of the issues, and to negate the element of surprise, it might be well to require physical amendment of the pleadings⁹⁸ at the close of the evidence, and before instructions are given. This completed, either party should be given a chance to introduce any new evidence pertaining to the issues or theories so formed. If this were done, the requisite notice would be given and the unnecessary delays and appeals of code pleading largely eliminated, for as mentioned earlier there are few instances when an automatic amendment on appeal can be properly allowed.

95. See IND. ANN. STAT. §§ 2-1024 and 2-1049; Rule 1-3, Rules of the Supreme Court, 1958; *Norris v. Casel*, 90 Ind. 143 (1883); *Myers v. Moore*, 3 Ind. App. 226 (1884); *Bangert v. Hubbard*, 127 Ind. App. 579, 126 N.E.2d 778 (1957); but see *Poer v. Johnson*, 48 Ind. App. 596, 96 N.E. 189 (1911); *Armour Co. v. Anderson*, 144 Ind. App. 485, 51 N.E.2d (1943) (to the effect that evidence of accord and satisfaction though not pleaded affirmatively, when admitted without objection waives the plaintiff's right to say that such defense was not an issue in the case).

96. "[W]e are now inclined to doubt the wisdom of punishing a litigant for the failure of his counsel to observe the strict letter of the rules of pleading." Pike, *supra* note 4, at 67.

97. See *supra* notes 5-7 for reference to the federal rules in this area. Indiana has, in addition to the pre-trial conference, provisions for interrogatories, IND. ANN. STAT. § 2-1728 (Burns 1946); the physical examination of a party, e.g., *City of Valparaiso v. Kinney*, 75 Ind. App. 660, 131 N.E. 237 (1921); examination of books and documents, IND. ANN. STAT. §§ 2-1644, 2-1645 (Burns 1946); and depositions, IND. ANN. STAT. §§ 2-1501 through 2-1532 (Burns 1946).

98. It is important in Indiana to physically amend the pleadings to show the issues actually tried. In subsequent litigation, only the common law record will be examined in determining whether a prior litigation is *res judicata*. See *Roll v. Roll*, 128 Ind. App. 360, 146 N.E.2d 553 (1957); *Angola State Bank v. Sanders*, 222 Ind. 244, 52 N.E.2d 620 (1944). Under the more liberal federal practice the evidence, as well as the pleadings, may be examined. E.g. *The Evergreens v. Nunan*, 141 F.2d 927 (1944). See Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 342 (1948).